BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH CROPP[1]	)	
Claimant	)	
	)	
VS.	)	
	)	
THE CAMELOT SCHOOLS, INC.	)	
Respondent	)	Docket No. 1,047,923
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 11, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Joseph Seiwert of Wichita, Kansas, appeared for claimant. John M. Graham, Jr., of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that it was more probably true than not true that claimant sustained an injury by an accident that arose out of and in the course of her employment with respondent and that notice was timely. The ALJ appointed Dr. Rosalie Focken as claimant's authorized treating physician, ordered respondent to pay claimant's outstanding and related medical expenses incurred to date, and ordered respondent to pay claimant temporary total disability benefits from July 6, 2009, until claimant is released to substantial and gainful employment.

[1] At the preliminary hearing, claimant identified herself as Deborah Cropp Nielson.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 9, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[2]

ISSUES

Respondent requests review of whether claimant suffered an accident or occupational injury that arose out of and in the course of her employment and whether claimant gave respondent timely notice of her accidental injury. Further, respondent asks the Board to find a date of accident.[3]

Claimant argues that the evidence establishes that she was injured on June 13, 2009, and that her injury arose out of and in the course of her employment with respondent. Further, claimant asserts the evidence shows that both she and a coworker reported the incident and the injury on June 13, 2009.[4]

The issues for the Board's review are:

(1) Did claimant suffer accidental injury that arose out of and in the course of her employment with respondent?

(2) Did claimant give respondent timely notice of her accident?

FINDINGS OF FACT

Claimant started working for respondent, a residential treatment center, as a teacher/counselor, on June 4, 2009. The next day, June 5, 2009, she was present during a fight in the yard. She testified that she was hit in the head many times, suffering injuries to her head and a chipped tooth. She filed a workers compensation claim in regard to the June 5, 2009, injury (Docket No. 1,047,922). Although that claim was consolidated with the claim in Docket No. 1,047,923, for the purpose of the February 9, 2010, preliminary hearing, the ALJ entered separate orders in the two claims, and there has been no appeal from the order entered in Docket No. 1,047,922.

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[2] This claim was consolidated for hearing with another claim, Docket No. 1,047,922. That claim was not appealed, and the parties agree that no issues are being raised to the Board concerning Docket No. 1,047,922.

[3] This last issue is one the Board does not have jurisdiction over in an appeal from a preliminary hearing order. Further, respondent does not argue the merits of this issue in its brief to the Board.

[4] Claimant's Form K-WC E-1, Application for Hearing, alleges a date of accident of "on or about June 14, 2009, and each day worked thereafter." At the preliminary hearing, however, claimant testified to only a single accident, not a series. And claimant's brief to the Board alleges only a single accident on June 13, 2009.

The claim in Docket No. 1,047,923 involves claimant's alleged injury of June 13, 2009. On that day, the residents were under lock down. Claimant said she was told to go through certain rooms and remove items. She went into one particular room, and the resident was still in the room. Claimant was pulling the mattress, and the resident took the end piece from the mattress and started using it as a weapon. The resident attacked claimant until a coworker came in and helped with the incident. Claimant said she was kicked in her stomach, arms and upper back. She said she filled out an incident report and she reported the incident to Crystal,[5] the senior person there. She did not see any supervisors around at the time. She did not ask for medical treatment that day but went home because she was in so much pain. She said that is when her bodily functions stopped working. She said her personal physician, Dr. Rosalie Focken, has described her condition as edema. She was given a restriction that she be allowed to use the restroom and drink fluids during her shift at work. However, she testified she was unable to use the restroom as she needed. She testified her condition worsened to the point where she could not take off her shoes at the end of the day. She said she reported that to her employer and let them know this was a result of the June 13 incident. Claimant said respondent's personnel tried to tell her that the edema was caused by her recent surgery,[6] but claimant said Dr. Focken ruled that out. She said Dr. Focken told her that the cause of her edema was getting kicked in the kidney.

Claimant said respondent did not offer to send her to a doctor but, instead, told her to return to her personal physician, which she did. Although she thought she had seen Dr. Focken earlier in relation to her June 13 incident, according to the medical records her first visit to Dr. Focken after June 13 was on June 25, 2009. At that time, claimant complained of leg cramps and increased swelling, which she appeared to relate to the amount of standing she did in her job with respondent. There is no mention in the June 25, 2009, medical records of claimant's incident on June 13, 2009, although claimant testified she told Dr. Focken about the event.

On July 6, 2009, Dr. Focken restricted claimant to no standing more than 30 minutes at a time and no sitting more than 30 minutes at a time. Claimant testified that she was informed that respondent was unable to accommodate her restrictions, and she was terminated. She continued to be treated by Dr. Focken for her edema. Dr. Focken's medical note of November 11, 2009, states:

> I believe her edema may be a side effect of the Seroquel. Patient has noted it to have worsened with her job. Patient had been doing much standing. She no longer

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[5] Claimant did not know Crystal's last name. Her coworker, Christine Cavender, testified she thought Crystal's last name was Garrison, but she was not sure.

[6] On June 11, 2009, claimant underwent endometrial ablation surgery and was off work for two days. June 13, 2009, was her first day back to work after her surgery.

> has this job. Patient has been fired, but she continues to have the swelling. Thus, I do not believe it is due to standing but maybe a side effect of the medication.[7]

Claimant testified Seroquel is for mood swings but that she does not take it. Nevertheless, medical records from June 25, 2009, through January 12, 2010, record Seroquel as one of her medications.

Leesa Beam testified that she is respondent's business office manager, and she also works in human resources. Ms. Beam testified she was not aware that claimant was claiming a June 13, 2009, injury at work until she received a report from respondent's insurance carrier in October 2009. She had not received any paperwork from anyone reporting an injury on June 13, 2009, before then. She had received the medical restrictions regarding claimant, but she said the medical restrictions were not for a work injury. None of the off-work slips she received concerning claimant indicated they were for a work-related injury. Ms. Beam testified that claimant's time off work was due to her personal medical condition.

Ms. Beam testified that she would get copies of any reports of incidents in which an employee is injured. She is not responsible for reports of incidents between patients or between patients and staff unless the staff member is injured. Ms. Beam said that a report would have been issued for the June 13, 2009, incident, but there was no report of an injury. Ms. Beam is not aware of how respondent's insurance carrier became aware of the June 13, 2009, incident.

Christine Cavender worked for respondent, starting the same day as did claimant. She was terminated on December 23, 2009. She and claimant were friends before they started working at respondent.

Ms. Cavender said that on June 13, 2009, she and claimant were working together to remove items from the room of one of the residents. The items were taken to a storage room about 10 to 12 feet away from the resident's room. Ms. Cavender said she was in the storage room putting away some items when she heard scuffling and then heard claimant calling for assistance. Ms. Cavender left the storage room and went to the resident's room. She saw the resident crouched in a corner of the room. Claimant was five or six feet away from the resident. The patient was flailing a corner round from a mattress in Ms. Cavender's direction and in the direction of claimant. Ms. Cavender and claimant tried to take the corner round away from the resident, and eventually Ms. Cavender was able to retrieve the item from the resident. Claimant told Ms. Cavender that the resident had assaulted her while Ms. Cavender was in the storage room.

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[7] P.H. Trans., Cl. Ex. 2 at 21.

Ms. Cavender said that she and claimant had to write up an incident report. She said that claimant was complaining of injuries at that time. Ms. Cavender said that she and claimant reported the incident to a supervisor but she could not remember who that supervisor was. Ms. Cavender also said that she filled out a written report but could not remember if she directly gave it to a supervisor or placed it in a supervisor's mailbox.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

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[8] K.S.A. 2009 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.* at 278.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

Claimant testified to a June 13, 2009, accident where she was assaulted and battered by a patient. The incident was not witnessed by anyone else, but a coworker, Ms. Cavender, heard and responded to claimant's call for help. Although denied by respondent, both claimant and Ms. Cavender testified that claimant verbally reported the incident to the senior worker on duty and made a written report to a supervisor that same day. That individual to whom claimant reported the incident did not testify. The testimony of claimant and Ms. Cavender concerning the accident and reporting of the accident are uncontradicted. There is contrary evidence in that the contemporaneous medical records do not mention a work-related accident and Ms. Beam testified that she has no record or report of the accident. Nevertheless, the greater weight of the evidence is that claimant did suffer injury as a result of the assault at work as alleged and that claimant gave respondent timely notice of the accident. Whether the injuries that claimant suffered in the

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[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2009 Supp. 44-555c(k).

work-related incident were the cause of her edema presents a closer question. But based on claimant's testimony and the medical evidence presented to date, this Board Member finds that claimant has met her burden of proof in this regard. Claimant testified she did not have edema before being kicked in the kidney at work on June 13, and this is consistent with Dr. Focken's records.

CONCLUSION

(1) Claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on June 13, 2009, as alleged.

(2) Claimant gave respondent timely notice of her accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 11, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge